Supreme Court, U. S.
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# 79-1355

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

ESTATE OF FANNIE ALPERSTEIN,
DECEASED, ROSALIND A. GREENBERG,
ADMINISTRATRIX,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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The Petitioner, ESTATE OF FANNIE ALPERSTEIN, DECEASED, ROSALIND A. GREENBERG, ADMINISTRATRIX, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit entered December 7, 1979.



## JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

Is the value of property over which a decedent is given a testamentary power of appointment includable in the decedent's gross estate pursuant to I.R.C. 2041 even though the decedent, by stipulation, lacked the mental capacity under New York law to exercise said power at all times from its creation to the death of the decedent.

## STATEMENT OF THE CASE

Fannie Alperstein (hereinafter referred to as the decedent) died intestate on December 3, 1972. At the time of her death, the decedent was a resident of the State of New York. The decedent's daughter, Rosalind A. Greenberg, qualified as administratrix of the estate.

Decedent's husband, Harry Alperstein (hereinafter referred to as Harry), died testate on July 6, 1967.

Harry's will created a trust, the income of which decedent was to receive during her life, and over which the decedent was to have a general testamentary power of appointment. It is appropriate at this point to include for the court's guidance the provision in Harry's will (Article Fourth) creating said trust:

> ...If my wife, FANNIE ALPERSTEIN, shall survive me, I give and bequeath unto my Trustee hereinafter named an amount equal to the difference between



> (a) one-half of the value of my adjusted gross estate and (b) the value of all property passing to my said wife under any other article or articles of this, my Will, or otherwise, and with respect to which a marital deduction is allowable to my estate under the provisions of United States Internal Revenue Code, Section 812 (e); my said Trustees shall hold the sum so bequeathed to them, IN TRUST, to pay to my said wife all the net income therefrom Quarter-annually or at more frequent intervals during her life and upon her death she shall have the power by her last Will and Testament to appoint the entire principal of this trust fund then remaining in the hands of my said Trustees to her estate, free of any trust, or to or in trust for the benefit of anyone else.

Harry's will also provided that if decedent did not exercise the power of appointment, the property involved was to go to Harry's children or their issue.

Unfortunately, decedent was never able to exercise the power of appointment created by Harry's will. To quote from p. 3 of the Tax Court's opinion below:

> From the date of Harry's death through the date of her own death, Fannie lacked the requisite testamentary capacity to execute a will and she did not purport to exercise the power.

In point of fact, decedent was also judicially declared incompetent to manage herself and her affairs on December 27, 1967. At the time of decedent's death this judicial declaration was still in effect.

The Federal estate tax return filed for decedent's estate claimed decedent had a one-half interest in Harry's estate. Appellee assessed a deficiency in estate tax based on the inclusion in the estate of decedent of the value of all of the property placed in trust by Article Fourth of Harry's will, pursuant to I.R.C. Section 2041(a)(2). Petitioner challenged this deficiency in the United States Tax Court and the Second Circuit. All factual matters were stipulated to by the parties. The Tax Court and the Circuit Court for the Second Circuit held, that decedent's estate did include the value of the property over which she had been granted a power of appointment by Harry's will.



## REASONS FOR GRANTING THE WRIT

Petitioner and the I.R.S. entered into a clear stipulation to the effect that decedent never possessed sufficient testamentary capacity to execute a will from the time of Harry's death to the death of decedent. This stipulation binds Petitioner, the I.R.S., the Tax Court and the Circuit Court. This important pcint bears establishing at the outset by quoting the entire stipulation in question:

> 8. From July 6, 1967, the date of Harry's death, through December 3, 1972, the date of her death, the decedent lacked the requisite testamentary capacity to execute a will under New York law, and therefore, during that period the decedent was incapable, as a matter of law, of exercising the testamentary power of attorney (sic) granted to her in Harry's will. (emphasis added).

The above stipulation clearly establishes that there was never any chance of decedent exercising the power. There was no "lucid moment". Thus to allow the

I.R.S. to escape the effect of a stipulation freely entered into would be unconscionable.

Much of the ccnfusion in the case law relevant to the single question of law presented here stems from a failure to closely analyze the provisions of the trust over which the power of appointment is held. In this situation, Harry's will created a trust with two provisions relevant to decedent:

1. Decedent was to receive the income from the trust during her life; and

2. Decedent was to have the power, pursuant to her last will and testament, to direct who would receive the corpus of the trust.

It is important to consider what the trust created by Harry's will did not provide. It did not allow decedent to invade the corpus. It did not provide for any method for decedent to affect the disposition of the corpus except by her will.



The Circuit Court below relied heavily on the case of Pennsylvania Bank and Trust Co. v. U.S., 451 F. Supp. 1296 (W.D. Pa. 1978), aff'd 597 F.2d 382 (3d. Cir. 1979). At first blush, the Pennsylvania Bank case appears very similar to instant situation. In that case the will of decedent's husband established a trust for the benefit of decedent, giving her a general testamentary power of appointment over the corpus. The decedent was incompetent from the time of her husband's death to the time of her own death. The district court held that the decedent did hold a general power of apointment under I.R.C. Sec. 2041 and the Third Circuit affirmed.

The Circuit Court in its reliance on Penn. Bank rejected the argument that the decedent hald a power to invade and completely consume the corpus. This ability of the decedent to consume the

corpus is vital. If the decedent possessed a testamentary power of appointment only, no guardian or committee can exercise the power on behalf of the incompetent since a guardian cannot execute a will on behalf of the incompetent. In such a case, the decedent's previous incompetency effectively prevents the exercise of any control over the appointive property. To the extent that a committee or guardian could exercise the power, it is clear that the power does not lack vitality merely as the result of the legal incapacity of the holder of the power.

The District Court's opinion in the Penn. Bank case recognized the importance of the above distinction while, at the same time, pointing towards a case which should be relied upon by this Court in its decision in this situation. First the District Court refers to two cases which the petitioner estate had relied upon:



> In support of these arguements (that the decedent did not possess a general power under I.R.C. Sec. 2041) plaintiff relies heavily on Finley v. United States, 404 F. Supp. 200 (S.D. Fla. 1975) and Estate of Anna Lora Gilchrist, 69 T.C. No. 2 (Oct. 11, 1977). The opinions in these cases are quite persuasive from an equitable point of view. 451 F. Supp. at 1298. (emphasis added).

The District Court then went on to distinguish the Finley case on the grounds outlined above, thus making it obvious that Finley and not Penn. Bank should be relied upon in this case:

> Neither Finley nor Gilchrist involved all of the factors relevant to Mrs. Brice's situation. In Finley the decedent had no right to consume the corpus of the trust and upon initiation of the suit by her executors the marital deduction was withheld from her husband's estate;... 451 F. Supp. at 1298-9 (emphasis added).

Similarily, the decedent herein had no right to invade or consume the corpus. The Third Circuit approved the reasoning employed by the District Court in Penn. Bank as evidenced by its opinion:

> ...(W)e agree with the judgment and well-reasoned opinion of Judge Marsh...Seeing no value in re-casting that opinion in words of our selection, we adopt as our own its relevant portions...

Turning to Finley itself, it can be seen that that case is very close to the instant situation. The decedent in Finley was given a general testamentary power of appointment over a trust set up by her husband's will. From the time of the husband's death until the time of decedent's death, she was incompetent. The court held that because the decedent "lacked the legal capacity to exercise the general power appointment" she was prevented "from possessing a general power of appointment within the meaning of Section...2041(a)(2)." 404 F. Supp. at 204.

The Circuit Court dismissed the Finley case with the statement, without reasons, saying only that it was wrongly decided. (at p.552).



The Finley decision, based on the proposition, equally applicable here, that the power could not be exercised by anyone should be applied in this situation. The decedent herein never "enjoyed" any incidents of the ownership of the power of appointment created by Harry's will. Had it been exercisable in any other manner than by will, or had the decedent been able to invade the corpus, then decedent would have enjoyed some incidents of ownership, since a guardian or committee (depending on state law) could have exercised the power and/or invaded the corpus for the decedent. Likewise, if the holder of the pwer could, in a "lucid moment" exercise the power, he or she also would have possessed incidents of ownership.

Congress did not intend Sec. 2041 to encompass a power of appointment which the decedent was incapable of exercising by

reason of mental incompetence.

One simple circumstance clearly indicates that Congress did not intend the text of Sec. 2041 to encompass such a situation as is here presented. Proposed Treasury Regulation Sec. 20.2041-3(b), October 14, 1956 contained the following language:

> A power of appointment is considered to exist on the date of decedent's death even though the decedent was at death and at all times since the creation of the power, under physical, mental or legal disability (whether or not adjudged incompetent).

Clearly such a provision would be dispositive of the issue at bar. However, in adcpting the final Treasury Regulation Sec. 20.2041-3(b) (1958), the Treasury Department completely omitted the quoted provision. This is a clear indication that the I.R.S. felt that Congressional intent was not to tax powers of appointment in incompetent's estates. The Third Circuit's attempt to explain away this



omission in the Penn. Bank case, defies analysis. The court therein states that the omitted sentence would have caused confusion, citing a gift tax regulation (Sec. 25.2503-4) to similar effect as its support for such a conclusion. Even the Circuit Court recognized that the I.R.S. had no explanation for its decision to drop the disability language from its final regulations. (P.545). It is submitted that if the I.R.S. had wanted to eliminate confusion, it could have clarified the regulation. Totally omitting the above sentence can lead to but one conclusion: i.e., that the Service did not agree with its effect.

That Congress did not intend to apply Sec. 2041 to a situation such as is presented here is manifest when one considers the result if the Circuit Court's decision below is allowed to stand. Decedent's estate will be charged with property over

which she never had a single modicum of control, which she was powerless to disclaim and the disposition of which was ultimately ccntrolled by her late husband's will. Congress could not have intended such an unjust and illogical result.

There are four recent decisions in the District Courts that are now under appeal to the Circuit Court of Appeals for the Fifth Circuit, namely, Finley v. United States, 404 F, Supp. 200 (S.D. Fla. 1975); Estate of Gilchrist v. C.I.R., 65 T.C. 5 (1977); Williams v. United States, 78-2 U.S.T.C. Par. 13,264 (W.D. Texas 1978); and Estate of Reid v. C.I.R., 71 T.C. 816 (1979). The question at hand, therefore, has still not been uniformly decided by all the Circuits. Furthermore, as the Circuit Court below stated, the Supreme Court has not had the occasion to rule on the effect of incompetency of the



of the holder of a general power on taxability under Sec. 2041.

## CONCLUSION

Wherefore, the Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX



71 T.C. No. 32

UNITED STATES TAX COURT

ESTATE OF FANNIE ALPERSTEIN, Deceased, ROSALIND A. GREENBERG, Administratrix Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 796-77. Filed December 6,1978.

Held, under sec. 2041(a)(2), I.R.C. 1954, decedent at her death possessed a general power of appointment over certain property pursuant to her deceased husband's will even though she was incompetent at his death and so remained until her own death.

Albert B. Gins and Alan Prigal, for the petitioner.

Robert E. Marum, for the respondent.

OPINION

FEATHERSTON, Judge: Respondent determined a deficiency in the amount of $89,856.21 in the estate tax of the estate of Fannie Alperstein. Certain issues having been settled by the parties, the sole issue remaining for decision is whether Fannie Alperstein, the decedent, possessed at her death a general power of appointment within the meaning of section 2041(a)(2).[1/]

The facts have been stipulated.

Fannie Alperstein (sometimes hereinafter referred to as Fannie or the decedent), a resident of New York, died intestate of December 3, 1972. Her daughter, Rosalind A. Greenberg, who qualified as executrix of the estate,

1/ All section references are to the Internal Revenue Code of 1954, as in effect at the time of decedent's death, unless otherwise noted.



was a legal resident of New York when the petition was filed. The estate tax return was filed with the Internal Revenue Service Center, Holtsville, New York.

Decedent's husband, Harry Alperstein (Harry), died testate on July 6, 1967. Article Fourth of his will, in pertinent part, is as follows:

> If my wife, FANNIE ALPERSTEIN, shall survive me, I give and bequeath unto my Trustees hereinafter named an amount equal to the difference between (a) one-half of the value of my adjusted gross estate and (b) the value of all property passing to my said wife under any other article or articles of this, my Will, or otherwise, and with respect to which a marital deduction is allowable to my estate under the provisions of the United States Internal Revenue Code, Section 812(e); my said Trustees shall hold the sum so bequeathed to them, IN TRUST, to pay to my said wife all the net income therefrom quarter-annually of at more frequent intervals during her life, and upon her death she shall have the power by her last Will and Testament to appoint the entire principal of this trust fund then remaining in the hands of my said Trustees to her estate, free of any trust, or to or in trust for the benefit of anyone else. (Emphasis added.)

If Fannie did not exercise the power of appointment conferred by this last clause, the unappointed property was to pass to Harry's children or their issue.

From the date of Harry's death through the date of her own death, Fannie lacked the requisite testamentary capacity to execute a will and she did not purport to exercise the power. On December 27, 1967, she was judicially declared to be incompetent to manage herself and her affairs, and her daughter, Rosalind A. Greenberg, was appointed as the committee of Fannie's person and property. That judicial declaration remained in effect until Fannie died.

The Federal estate tax return filed for decedent's estate reported that Fannie "at the time of death had a 50% interest in the estate of Harry Alperstein as legatee." Respondent argues that the full value of the property placed in



trust by Article Fourth of Harry's will was subject to the power of appointment given Fannie and is, therefore, includible in her gross estate under section 2041(1)(2). The parties have stipulated that if decedent possessed a testamentary power of appointment pursuant to Article Fourth of Harry's will, decedent's gross estate will be increased by $242,167.15.

Section 2041(a)(2)[2/] provides that a decedent's gross estate shall include the value of "any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942." A

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2/ SEC. 2041. POWERS OF APPOINTMENT

(a) In General--The value of the gross estate shall include the value of all property--

(2) Powers created after October 21, 1942--To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942,***.

"general power of appointment" is defined by section 2041(b)(1) as a "power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate." The parties agree that the language of Harry's will was legally sufficient to confer on Fannie a general power of appointment within the meaning of section 2041(a)(2). The only issue is whether Fannie's mental incompetency, which deprived her of the legal capacity to exercise the testamentary power from the date of Harry's death to her own death, renders the section inapplicable. We hold that it does not.

The term "exercisable" as used in section 2041(b)(1) refers to the existence of the power in the decedent to appoint rather than his or her capacity to exercise that power. Although Fannie was incompetent at Harry's death and so remained to the date of her own death,



under New York law she could hold title to property and was, therefore, a permissible donee of the appointment power. N.Y. Estates, Powers and Trusts, sec. 10-4.1(a)(3) (McKinney 1967). There was the possibility that she would recover her competency and exercise the power by making a valid will. See Miller v. Brinton, 294 Ill. 177, 128 N.E. 370 (1920). New York law recognizes that a will made by a person who has been judicially declared insane is valid if, when the will was made, he had the testamentary capacity required by law in other cases. Cf. In re Charap's Will, 4 Misc. 2d 627, 140 N.Y.S. 2d 92, 94 (1955) affd. 286 App. Div. 1000, 145 N.Y.S. 2d 311 (1955); In re Widmayer, 74 App.Div. 336, 77 N.Y.S. 663, 664 (1902); In re Coe's Will, 47 App. Div. 177, 62 N.Y.S. 376, 377 (1900); In re Hill's Will, 73 N.Y.S. 2d 258, 262 (1947), appeal dismissed 78 N.Y.S.2d 365 (1948); In re Lapham's Will, 19 Misc.

Rep. 71, 44 N.Y.S. 90, 93 (1896); Page 1 on Wills, sec. 12.42, pp. 650-651 (Bowe-Parker rev. 1960). Thus it is clear that Fannie possessed the testamentary power at her death. At her death, the power terminated, and the property passed to Harry's children or their issue. Fannie's possession of this exercisable power at her death is sufficient to require its inclusion in her estate.[3/]

Numerous court decisions involving analogous factual situations show that the existence of a power to appoint within the meaning of section 2041 (a)(2) is not dependent on the capacity of the decedent to exercise the power. Thus, in Fish v. United States, 432 F,2d 1278 (9th Cir.

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3/ Fannie's death caused a transger or shifting in relationships to property subject to the appointment power, and such a transfer or shifting in relationships to property is an appropriate occasion for the imposition of the estate tax. U.S. Trust Co. v. Helvering, 307 U.S. 57, 60 (1939).



1970), the decedent-wife, at the death of her husband, received a general power to appoint certain trust income. She was competent for 2 years and then became and remained incompetent until her death. She did not exercise the power and it lapsed. The government argued that the lapse constituted a release of the power within the meaning of section 2041(b)(2). That section provides that the value of the gross estate shall include the value of property to the extent of any property with respect to which the decedent has at any time "exercised or released" such a power of appointment by a disposition which is in the nature of a transfer of property. The estate of the decedent-wife argued that, because she was incompetent at her death, her failure to act did not constitute a release of the power. The court rejected that argument, stating (432 F.2d at 1280):

> The precise manner of exercising or releasing the power is immaterial for purposes of determining taxability. Thus it is sufficient here that the power was released by its annual expiration or lapse, and it is immaterial whether the lapse occurred through a designed failure to exercise the power or through the indifferrence or incompetency of the decedent.

In Estate of Bagley v. United States, 443 F.2d 1266 (5th Cir. 1971), a husband and wife were killed in an automobile accident, and it could not be determined who survived the other. Effect was given to a provision in the husband's will that, in case of death in such circumstances, the wife would be deemed the survivor. His estate was allowed a marital deduction for property placed in trust, and his will gave power of appointment over such property. The wife's estate contended that the wife, under section 2041 (a)(2), did not possess a power of appointment over the trust assets at the time of her death because her husband's will had not been admitted to probate. Rejecting



this argument on the ground that the process of probating a will is essentially a formal validation of the property interests which come into existence upon the death of the testator,[4/] the court stated (443 F.2d at 1270):

> For the theoretical instant in which Mrs. Bagley survived her husband, the power of appointment created by the husband's will was exercisable.*** the length of survival dces not change the character of the property interest.

In Pennsylvania Bank and Trust Co. v. United States, 451 F. Supp. 1296 (W.D. Pa. 1978), where the facts were very similar to those in the instant case, the court held that the fact that the decedent

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4/ In Commissioner v. Noel's Estate, 380 U.S. 678 (1965), involving the includibility under sec. 2042(2) of flight insurance proceeds, the decedent gave the policies to hsi wife and was killed in a place crash. Under the terms of the policy the decedent retained powers to assign the policies and to change the beneficiaries. Holding that these powers were incidents of ownership, the Supreme Court said (at 684):

Mrs. Brice, was incompetent when she acquired her power and did not regain her competency at any time prior to her death were irrelevant. The court stated (supra. at 1301):

> Plaintiff argues that in the present case where Mrs. Brice's condition was hopeless and incurable a determination could have been made when Mr. Brice died that Mrs. Brice would never be able to competently exercise the power. Even though she had been adjudicated an incompetent, however, there was always the legal possibility that Mrs. Brice someday could regain her competency, or that she at least could have a lucid interval. Thus, as long as she lived it could not assumed conclusively that she would not validly execute the power.

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Footnote 4--continued:

> It would stretch the imagination to think that Congress intended to measure estate tax liability by an individual's fluctuating, day-by-day, hour-by-hour capacity to dispose of property which he owns. We hold that estate tax liability for policies "with respect to which the decedent possessed at his death any of the incidents of ownership" depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it a particular moment.



To the same general effect, see Jenkins v. United States, 428 F.2d 538 (5th Cir. 1970) (power to appoint left by will to a sister who died 2 weeks later, prior to probate of the will); Estate of Freeman v. Commissioner, 67 T.C. 202 (1976) (decedent never saw the trust instrument and did not know he had the power of appointment.[5/]

The cases relied upon by petitioner are distinguishable. In Estate of Gilchrist v. Commission, 69 T.C. 5 (1977), on appeal (5th Cir., June 20, 1978), a testamentary power was not involved. Rather the decedent by her husband's will was given "the income the use and benefits with full rights

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5/ In Hurd v. Commissioner, 160 F.2d 610 (1sr Cir. 1947), the court held that the decedent's power to alter, amend, or revoke a trust caused inclusion in the decedent's estate under the predecessor of sec. 2038 even though she became incompetent prior to her death. The cout said (at 613):

> The statute is not concerned with the manner in which the power is exercised, but rather with the existence of the powerw.

to sell or transfer all the remainder of my property, both real and person, so long as she may live." After her husband died, decedent was declared incompetent and guardians of her person and estate were appointed. This Court held that decedent did not have a legal power to appoint to herself because she had been declared incompetent, and what powers she had could be exercised only by her guardians. Under Texas law, as it then stood, the guardians as substitutes for decedent, could not exercise the power to consume or use the estate's property in the same manner as she could have had she been competent. They were limited to prescribed standards. On this ground the court concluded that the decedent in that case did not possess a general power of appointment at her death. In contrast, the decedent in the instant case under New York law, as discussed above, in a lucid interval could have made a valid will, thereby exercising her testa-



mentary power of appointment.

The facts in Finley v. United States, 404 F. Supp. 200 (S.D. Fla. 1975), were similar to the facts in the instant case, and the district court concluded that the decedent in that case, because of her mental incompetence, did not have a section 2041 power. As we read the opinion, the district court failed to distinguish the possession of an appointment power, as contemplated by section 2041(a)(2), from the ability to exercise such power. Nor did the district court indicate whether under Florida law, which was apparently applicable in that case, an individual may execute a valid will. As pointed out above, such a person in New York may hold a power of appointment and, during a lucid interval, validly execute a will. We think it clear, therefore, that the decedent in the instant case at her death possessed a general power of appointment over disputed property.

To reflect the disposition of other issues,

Decision will be entered under Rule 155.



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 166—September Term, 1979.

(Argued October 24, 1979 Decided December 7, 1979.)

Docket No. 79-4116

ESTATE OF FANNIE ALPERSTEIN, DECEASED,
ROSALIND A. GREENBERG, Administratrix,

*Petitioner-Appellant.*

—v.—

COMMISSIONER OF INTERNAL REVENUE,

*Respondent-Appellee.*

Before:

FRIENDLY, OAKES and NEWMAN,
*Circuit Judges.*

Appeal by taxpayer from a decision of the Tax Court, C. Moxley Featherston, *Chief Judge,* refusing to annul the Commissioner's determination of a deficiency in the estate tax of Fannie Alperstein based upon her possession of a general power of appointment, I.R.C. §2041(a)(2).

Affirmed.

ALBERT B. GINS, Esq., Boonton, N.J., *for Petitioner-Appellant.*

JAMES A. RIEDY, Esq., Washington, D.C., (M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews, Richard Farber, Attorneys, Tax Division, Department of Justice, Washington, D.C., of Counsel), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge:*

Rosalind A. Greenberg, executrix of the estate of Fannie Alperstein, filed a petition in the Tax Court seeking redetermination of a deficiency in federal estate tax asserted by the Commissioner of Internal Revenue. Certain other issues having been settled, the sole question left for determination by the Tax Court was whether the Commissioner was correct in asserting that the decedent possessed a general power of appointment within the meaning of I.R.C. §2041(a)(2) over the corpus of a trust established for her benefit in her husband's will. Chief Judge Featherston ruled in favor of the Commissioner and the estate has appealed. We affirm.

The facts have been stipulated. Fannie Alperstein died intestate on December 3, 1972, after surviving her husband, Harry, who had died more than five years earlier on July 6, 1967. His will established a trust for the benefit of the decedent which was to contain the maximum portion of his adjusted gross estate that was allowable as a marital deduction. I.R.C. §2056. Fannie Alperstein was to receive all the net income from the trust payable at frequent intervals for the duration of



her life, and was granted a testamentary power to appoint the principal of the trust free of any restrictions.[1] If the decedent failed to exercise her testamentary power of appointment, Mr. Alperstein's children or their issue would take in default.

On January 16, some six months before Harry Alperstein's death, Fannie Alperstein had entered a nursing home where she remained until shortly before her death. On December 27, 1967, a New York court declared Fannie to be incompetent and appointed her daughter, Rosalind A. Greenberg, to manage her person and property. Although the judicial determination of the decedent's incompetence followed the death of Mr. Alperstein by almost six months, the parties have stipulated that from her husband's death until her own death, the decedent lacked the capacity to execute a will under New York law, did not purport to exercise the power of appointment granted by her husband's will, and was legally incapable of exercising that power.

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1 In relevant part, Article Fourth of Mr. Alperstein's will provided:

> If my wife, FANNIE ALPERSTEIN, shall survive me, I give and bequeath unto my Trustees hereinafter named an amount equal to the difference between (a) one-half of the value of my adjusted gross estate and (b) the value of all property passing to my said wife under any other article or articles of this, my Will, or otherwise, and with respect to which a marital deduction is allowable to my estate under the provisions of the United States Internal Revenue Code, Section 812(e); my said Trustees shall hold the sum so bequeathed to them, IN TRUST, to pay to my said wife all the net income therefrom quarter-annually or at more frequent intervals during her life, and *upon her death she shall have the power by her last Will and Testament to appoint the entire principal of thus trust fund then remaining in the hands of my said Trustees to her estate, free of any trust, or to or in trust for the benefit of anyone else.* [Emphasis added.]

Rosalind A. Greenberg, the decedent's executrix, filed a federal estate tax return that did not include in the decedent's gross estate the value of the property over which the decedent had been granted testamentary power of appointment by her husband's will. The Commissioner asserted a deficiency based on his determination that the decedent possessed at death a general power of appointment within the meaning of I.R.C. §2041(a)(2), which required the inclusion of the entire value of the property subject to that power within her gross estate. The parties have stipulated that if the property subject to the power created by Mr. Alperstein's will is included in the decedent's gross estate, that property is to be valued at $242,167.17.

In relevant part, I.R.C. §2041 provides:

> (a) . . . The value of the gross estate shall include the value of all property—
>
> * * *
>
> (2) . . . [W]ith respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942 . . . . For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death . . . . whether or not . . . the power has been exercised.
>
> * * *
>
> (b) *Definitions.*—For purposes of subsection (a)—
>
> (1) . . . The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate . . .



Appellant does not question that, so far as language is concerned, the power of appointment conferred by Article Fourth of Harry Alperstein's will, see note 1 *supra*, met the statutory test. The claim is that, despite this §2041(a)(2) is inapplicable because, under the stipulated facts, Fannie Alperstein was never able to exercise the power vested in her by her husband's will—a situation allegedly not present in any of the cases that have sustained the taxability of powers against attacks of the same general sort as that mounted here.[2]

I.

We start, as always, with the words of the statute. *F.T.C.* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 350 (1941). The operative verb in §2041(a)(2) is "has". Beyond cavil Mrs. Alperstein "had" a general power of appointment at the time of her death. This had been granted by her husband's will and nothing done by the New York courts purported to take it away. Even if we assume that the judgment of Fannie Alperstein's in-

2 In fact Mrs. Alperstein's inability ever to have exercised the power is not so clear as appellant's counsel asserts. Harry Alperstein's will was executed on September 23, 1953. The stipulation that Mrs. Alperstein was incompetent to execute a valid will after her husband's death on July 6, 1967, does not negate her capacity to have exercised the power prior to his death. Absent contrary specification by the donor, New York law does not require the donee of a testamentary power to provide for its exercise in a will executed subsequent to the donor's death. See N.Y. Est., Powers & Trusts Law § 10-6.1 (McKinney). Indeed, Mrs. Alperstein could have exercised the power by a will made even before Harry's will was executed. *See, e.g., In re Tucker's Trust*, 41 Misc. 2d 405, 244 N.Y.S. 2d 356 (S. Ct. 1963); *In re Thorne's Trust*, 9 Misc. 2d 126, 167 N.Y.S. 2d 211 (S. Ct. 1957), *aff'd*, 6 A.D. 2d 783, 175 N.Y.S. 2d 559 (1958), *aff'd*, 6 N.Y. 2d 967, 191 N.Y.S. 2d 165, 161 N.E. 2d 391 (1959). However, we do not find it necessary to rest decision on this ground.

competency conclusively established her inability to exercise this power, that judgment was subject to being vacated if her mental condition changed for the better. The argument is rather that although Mrs. Alperstein "had" such a power, it was not "exercisable" at the time of her death since she had long since been declared incompetent and in fact had been so ever since her husband had died. However, the word "exercisable" is found not in the operative portion of the statute but in a section addressed to how broad a power must be in order to be "general". The natural meaning of the words is that "exercisable" is shorthand for "which by its terms may be exercised," and does not mean that §2041(a)(2) is limited to cases where the decedent could in fact exercise the power at the moment of death—something which, in the absence of a will or similar instrument, could rarely occur.

II.

The meaning which thus emerges from the words of the statute is strongly reinforced by the legislative history. Section 2041 reflects, in all respects here relevant, the Powers of Appointment Act of 1951, 65 Stat. 91. The latter was a substantial amendment of the amendments to §811 of the Internal Revenue Code of 1939 that were included in the Revenue Act of 1942, 56 Stat. 798, 942.

Prior to the 1942 legislation, estate taxation of powers of appointment had remained substantially unchanged since §402 of the Revenue Act of 1918, 40 Stat. 1057, 1097, first imposed a federal estate tax on appointed property. Under pre-1942 law, such property was taxed "only if (1) the [decedent's appointive] power



was general, (2) the power was exercised, and (3) the appointive property passed as a result of such exercise. Craven, Powers of Appointment Act of 1951, 65 Harv. L. Rev. 55, 55-56 (1951). The 1942 amendments dramatically altered this policy in response to a widespread belief that it had served as "an outstanding device for the avoidance of estate tax." S. Rep. No. 1631, 77th Cong., 2d Sess. 232 (1942). Dissatisfaction with the pre-1942 law by those interested in protecting the revenue focused on the opportunities it afforded to avoid taxation, either through deliberately failing to exercise a general power of appointment (in effect, retaining the power to choose other appointees by deciding in favor of the takers-in-default) or through eluding court-fashioned definitions of "general" powers of appointment with the aid of minor restrictions that transmuted a general power into an exempt "special" power. See, e.g., Griswold, Powers of Appointment and the Federal Estate Tax, 52 Harv. L. Rev. 929 (1939); statement of Randolph E. Paul, Tax Adviser to Secretary of the Treasury, Hearings before Comm. on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. 91 (1942). Both loopholes were plugged by the 1942 amendments, which taxed all powers of appointment created after the enactment of the amendments regardless of whether they were exercised, save for those powers that could only be exercised in favor of certain restricted classes of potential appointees. See 1942 amendments, *supra*, at §403(a). In addition, the 1942 amendments fixed the time of death as the relevant moment for determining the existence of a taxable power. *Id.* §403(a). Powers that lapsed prior to the decedent's death were treated as taxable releases by the post-1942 estate and gift tax regulations. See U.S.

Treas. Reg. 105, §81.24(b)(1) (1943); U.S Treas. Reg. 108, §96.2(b) (1943).

The 1942 amendments extended the policy of taxing powers, regardless of exercise, to general powers created before the enactment of the amendments. See 1942 amendments, *supra*, §403(d)(1). However, the amendments sought to mitigate the retroactive impact of this by allowing a grace period in which all holders of general powers might release their power without estate tax consequences; *id.* §403(d)(3), and by extending this grace period in the case of holders who were "under a legal disability to release such power" until six months after the termination of their disability. *id.* §403(d)(2). Wartime military personnel were expressly included as beneficiaries of the legal disability grace period; the inclusion of other beneficiaries was to be determined in accordance with local law. *Id.* Senate Report No. 1631, *supra*, suggested that legal incompetents such as insane people, minors, and unborn children might be expected to benefit from this exemption. *Id.* at 234. Beyond demonstrating that when Congress wished to make a dispensation for incompetents, it has known how to say so, the fact that the 1942 Congress felt it necessary to include this provision strongly suggests its belief that the existence of a legal disability by the holder of a general power would not prevent inclusion of property subject to that power in the estate. Although the provision in question related only to pre-1942 powers, there is no reason to suppose that Congress intended a different rule with respect to incompetency for post-1942 powers.

Until the 1951 Act, Congress extended taxpayer deadlines for releasing pre-1942 powers on numerous occasions, see Craven, *supra*, at 60, but left the treatment of post-1942 powers unchanged. In the case of pre-1942 powers, the 1951 Act returned to the criterion of pre-1942 law by taxing only those general powers that had been exercised. 1951 Act, *supra*, §2(a). However, the 1951 Act continued the policy of taxing post-1942 general powers regardless of their exercise, and its legislative history contains no indication that Congress intended to alter the treatment of legally disabled holders of post-1942 powers. To the extent that the 1951 Act dealt more liberally than its predecessor with post-1942 powers, it did so only by shrinking the class of taxable powers to those that fall within its definition of "general powers"—a definition that looks primarily to the terms of the trust instrument and not at all to the status of the donee of the power.

This conclusion is also buttressed by one of the Act's broader purposes, namely, to provide "a test of taxability which is simple, clear-cut, and easy to apply." S. Rep. No. 382, 82d Cong., 1st Sess. 2, [1951] U. S. Code Cong. & Ad. News 1530, 1531. Linking an interpretation of "exercisable" to decedents' disabilities under local law would hardly simplify the 1951 test, particularly since the Act provides no basis for distinguishing decedents adjudged to be legally incompetent from those who were otherwise barred from exercising their powers.

We find no force in the contrary argument that Congress' concern in 1951 for those holders of *pre*-1942 powers who are "unwary" or "powerless to help themselves," S. Rep. No. 382, *supra*, [1951] U.S. Code Cong. & Ad. News at 1531, which led to a change from the policy of the 1942 Act with respect to such powers, may allow the courts to manifest a similar concern for holders of *post*-1942 powers. See Note, Federal Estate

Tax: A Possible Exception in the Application of I.R.C. Section 2041 to Testamentary Powers of Appointment Held by Incompetent Decedents. 1977 Brigham Young U. L. Rev. 644, 659 (1977); cf. *Estate of Bagley* v. *United States,* 443 F.2d 1266, 1272 (5 Cir. 1971) (Ainsworth, J., dissenting). This position ignores the strict division between pre- and post-1942 powers which is at the heart of the 1951 Act.

Further support for the construction that the 1951 Act embraced all general powers regardless of the donee's capacity to exercise them is furnished by a provision in the marital deduction, originally enacted by §361(a) of the Revenue Act of 1948 and now codified as amended in I.R.C. §2056(b)(5). This provides that property passing in trust to a surviving spouse will qualify for exclusion from the decedent's estate, *inter alia,* if the surviving spouse is entitled to all income from the property for life; if the surviving spouse has the power to appoint such property in favor of herself or the estate; and if the power to appoint such property, "whether exercisable by will or during life, is exercisable by such spouse alone and in all events." The Internal Revenue Service has long held that competency under local law is irrelevant for determining whether a power is "exercisable" within the meaning of the marital deduction. Rev. Rul. 55-518, 1955-2 Cum. Bull. 384; Rev. Rul. 75-350, 1975-2 Cum. Bull. 367. This conclusion is virtually dictated by the consideration that "[o]therwise, in view of the possibility that any given person may become legally incompetent during his or her lifetime, no trust could ever qualify under section 2056(b)(5)." Rev. Rul. 75-350, *supra,* 1975-2 Cum. Bull. at 368. The implication of accepting this most sensible construction of "exercisable"



in the marital deduction context is that at the time the 1951 Powers of Appointment Act was passed, a determinant legislative meaning as to what constitutes an "exercisable" power of appointment already existed in both the powers of appointment and marital deduction provisions of the Code. Still more persuasive is the evidence that Congress intended the marital deduction as a deferral of tax on property which, however, would eventually be subject to a gift or an estate tax paid by the surviving spouse or by her estate. See S. Rep. No. 1013, 80th Cong., 2d Sess. 16, [1948] U.S. Code Cong. & Ad. News 1163, 1238; *Northeastern Nat'l Bank* v. *United States,* 387 U.S. 213, 221 (1967) ("Congress' intent to afford a liberal 'estate-splitting' possibility to married couples, where the deductible half of the decedent's estate would ultimately—if not consumed—be taxable in the estate of the survivor, is unmistakable.") *United States* v. *Stapf,* 375 U.S. 118, 128 (1963) (purpose of marital deduction to tax married couples in stages but not to permit tax-exempt transfers into succeeding generations). Given that this purpose was served in 1948 by adopting the same use of "exercisable" in the marital deduction that already existed in the corresponding powers of appointment provision, Congress cannot be thought to have abandoned *sub silentio* the intended interaction between these two provisions a mere three years later and thereby to have created a situation, such as concededly would exist here if appellant were to prevail, wherein property escapes estate tax at the time of the death of the donor of the power because the competency of the donee is immaterial and also at the time of the death of the donee because competency is held to be crucial. The 1951 Powers of Appointment Act must be read not in

isolation but as a part of a comprehensive statutory scheme.[3]

III.

We find no basis for a contrary view in the Service's rulings and regulations.

The Service first addressed the relationship between incompetency and §2041(a)(2) in Rev. Rul. 55-518, 1955-2 Cum. Bull. 384 (1955), which ruled on the estate of a surviving spouse who had enjoyed an unrestricted lifetime power of appointment over a testamentary trust created by her husband. In a dual holding, the Service determined that the husband's estate qualified for a marital deduction and the wife's estate was taxable for her power even though the wife was incompetent from the date of her husband's death until the time of her own death. *Id.* 385. The Service reasoned that the wife could have exercised her power with the aid of a local court and, therefore, "possessed" the power at the time of her death even if she could not have freely exercised it at any time. *Id.*

A more general statement regarding incompetency entered the Proposed Rule Making of October 16, 1956, the first step in the Service's attempt to overhaul the estate tax regulations after the enactment of the Internal Revenue Code of 1954. Section 20.2041-3(b) of the proposed regulations, 21 F.R. 7850, 7883 (1956), provided:

3 We recognize that a general power of appointment can be conferred in contexts other than a marital deduction trust. However, now that property subject to such a power is taxable to the estate of the donee, use of the general power in the marital deduction trust must be far and away the principal one.



> [A] power of appointment is considered to exist on the date of the decedent's death even though the decedent was at death and at all times since the creation of the power under physical, mental, or legal disability (whether or not adjudged incompetent).

Yet—and this point is strongly pressed by appellant—the final Estate Tax Regulations, which were promulgated on June 24, 1958 and are still in effect, deleted all mention of "physical, mental, or legal disability" from §20.2041-3(b), while otherwise adopting the language of the proposed regulation *in toto*. 1958-2 Cum. Bull. 432, 528 (1958).

The Service offered no contemporaneous explanation for its decision to drop the disability language from its final regulations. However, persuasive support exists for the Government's contention that the disabilities sentence was dropped because it was thought to conflict with—or at least to seem to conflict with—the Service's provisional position on powers of appointment in the gift tax area. See *Pennsylvania Bank and Trust Co.* v. *United States*, 597 F.2d 382, 383 (3 Cir. 1979). Less than three months after the publication of the proposed estate tax regulations, the Service issued proposed regulations on the taxation of gifts made after 1954. Section 25.2503-4 of the proposed gift tax regulations detailed the circumstances under which transfers to minors would satisfy the conditions of I.R.C. §2503(c), and hence qualify as gifts of a "present interest" meriting the $3,000 gift exclusion available under I.R.C. §2503(b). Proposed regulation §25.2503-4 would have denied present interest treatment to property transferred by donating a power of appointment

to a minor if that power was qualified by substantive restrictions, including any restrictions imposed by local law on the minor's ability to exercise a power. Thus, unlike the proposed estate tax regulations, the proposed gift tax regulations seemed to make the "exercisability" of a power under local law into a critical requisite for its possession. Ironically, however, in the final gift tax regulations promulgated on November 15, 1958, the Service reversed itself on the disqualifying effect of legal restrictions on a minor's ability to exercise a power of appointment. The final §25.2503-4(b) stated:

> if the minor is given a power of appointment . . . , the fact that under local law a minor is under a disability to exercise an inter vivos power or to execute a will does not cause the transfer to fail to satisfy the conditions of section 2502(c).

It seems plausible, then, that the inconsistency between the treatment of legal disabilities under the proposed gift and estate tax regulations led the Service to withdraw its disability language from the final estate tax regulations while reconsideration of the disability issue under the gift tax regulations was still pending. Ultimately, the stance toward legal disabilities adopted in the treatment of gifts to minors was consistent with that originally proposed for the treatment of powers of appointment in the estate tax area. By this time, however, the final estate tax regulations had already been promulgated.

Even if this explanation should not be accepted, the most that can be said of the withdrawal of the legal disability language in the proposed regulations



is that the Service decided to leave the issue of the effect of incompetency for subsequent consideration by itself and ultimately by the courts. Despite the deletion of the disability language from the regulation, the Service has never withdrawn from the position it originally expressed in Rev. Rul. 55-518, discussed above. Rev. Rul. 74-350, 1975-2 Cum. Bull. 367, the Service's most recent pronouncement on the relationship between incompetency and the possession of a general power within the meaning of § 2041, extends the Service's original determination of taxability to a legally incompetent holder of a testamentary power who is indistinguishable from Mrs. Alperstein in all relevant respects. This ruling abandons any reliance on the possibility that a legally incompetent holder of a power might be able to exercise his power with the aid of a court or anyone else. Instead, it concludes:

> [j]ust as incapacity or incompetency does not render property owned outright by a decedent exempt from estate taxation, neither is property subject to a general power of appointment exempt in such circumstances, unless *by the terms of the grant of the power* such circumstances have caused the existence of the power itself to cease prior to the decedent's death. [Emphasis original.]

*Id.* at 368.

IV.

Although appellant may be right in contending that no decision upholding the estate taxation of property subject to a general power of appointment

has presented facts quite so humanly appealing in favor of the donee as this, the general thrust of the case law in appellate courts is decidedly unfavorable to her.

While the Supreme Court has not had occasion to rule on the effect of incompetency of the holder of a general power on taxability under § 2041, *C.I.R.* v. *Estate of Noel*, 380 U.S. 678 (1965), strongly indicated the Court's probable approach. *Noel* required a construction of I.R.C. § 2042, which provides *inter alia* that a decedent's estate is taxable for the proceeds of insurance policies on the life of the decedent "with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable alone or in conjunction with any other person." Immediately before boarding a plane doomed to a fatal crash, the decedent in *Noel* purchased several flight insurance policies which he left with his wife on the ground. The decedent's estate contended that on these facts there had been no exercisable incidents of ownership within the meaning of the statute. While acknowledging that "there was no practical opportunity" to exercise ownership power, the Court concluded:

> It would stretch the imagination to think that Congress intended to measure estate tax liability by an individual's fluctuating, day-to-day, hour-by-hour capacity to dispose of property which he owns. We hold that estate tax liability for policies "with respect to which the decedent possessed at his death any of the incidents of ownership" depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it at a particular moment.



*Id.* 684.

Three courts of appeals have considered the effect upon taxability under § 2041 of the inability of the holder of a power to exercise it; all have ruled in favor of the Government. In *Fish* v. *United States*, 432 F.2d 1278 (9 Cir. 1970), a surviving spouse received a non-cumulative power of appointment over the annual income from a trust corpus, which, if not exercised, lapsed at the conclusion of each year in which it was payable. The decedent's estate argued that her incompetence during the final years of her life rendered the periodic lapses of her power during those years outside the scope of § 2041(b)(2) (and thus not releases that were taxable to the decedent's gross estate). The Ninth Circuit concluded:

> The precise manner of exercising or releasing the power is immaterial for purposes of determining taxability. Thus it is sufficient here that the power was released by its annual expiration . . . , and it is immaterial whether the lapse occurred through a designed failure to exercise the power or through the indifference or incompetency of the decedent. [Citations omitted.]

*Id.* 1280. In a footnote, the *Fish* court observed that any different result "would be an open invitation to contest the competency of the decedent in every similar case," but also noted, in a remark on which appellant relies as a basis for distinction, that the *Fish* decedent had never been adjudicated to be incompetent before her death. *Id.* 1280 n.3.

The *Fish* decision was followed by *Estate of Bagley v. United States*, 433 F.2d 1266 (5 Cir. 1971) (Wisdom, Bell, and Ainsworth, C.JJ.). In *Bagley*, a

husband's will vested a testamentary power of appointment in his wife. The same will also provided that in the event of the simultaneous death of husband and wife, the wife should be deemed the survivor. Two days following the execution of the will, the couple died in an automobile accident, and a state court entered a decree honoring the will's simultaneous death provision. The *Bagley* majority (per Bell, J.) held that the wife had survived her husband for a "theoretical instant" during which her power of appointment had been exercisable within the meaning of § 2041(a)(2) and, moreover, that she had possessed the power granted by her husband's will under state law even though the will had not been probated at the time of her death. *Id.* 1269-70 Dissenting, Judge Ainsworth stressed the absence of any indication that the decedent knew of the power created by her husband's will.

Most relevant and persuasive of all is the recent decision in *Pennsylvania Bank and Trust Co.* v. *United States*, 597 F.2d 382 (3 Cir. 1979), aff'g. 451 F.Supp. 1296 (W.D. Pa. 1978). Under a 1956 will of her husband who died on February 9, 1965, Ethel S. Brice was given "the right during her life to consume or appoint by Will ... the entire principal of this Trust." Pursuant to a petition executed on February 12, 1965, Mrs. Brice was adjudicated an incompetent. It was undisputed that she had been incompetent since April 1960 and remained so until her death in August 1969; in her 1959 will she declined to exercise any powers of appointment. A carefully considered opinion by District Judge Marsh, unanimously affirmed by the Court of Appeals, held that the property subject to the power was taxable



as part of Mrs. Brice's estate, essentially for reasons such as those heretofore developed in this opinion. Appellant's sole distinction of the *Pennsylvania Trust* case, which counsel also contends to have been wrongly decided, is that Mrs. Brice's guardian could have directed that all the property in the trust be consumed on her behalf. We do not consider the distinction to be sufficient. The property was held taxable in Mrs. Brice's estate because at the time of her death she had a general power of appointment over it; the court considered the possibility of diversion of the property to her during her life only in rejecting the estate's claim that this brought the case within § 2041(b)(1)(A) which says that a

> power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

See 451 F.Supp. at 1302.[4]

Against this array of unfavorable decisions by the Supreme Court and courts of appeals, all of which emphasize the creation of rights and pay scant regard to the possibility of their exercise, taxpayer relies on four recent decisions of courts of first instance that are

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4 Two other court of appeals decisions rejecting claims that incompetency of the holder of the power permitted escape from taxation under I.R.C. § 2036 and § 2038, and their pre-1954 predecessors, § 811(c) and § 811(d) of the Code of 1939, which extend the estate tax to transfers made by trust or otherwise over which the decedent-donor retains certain enumerated powers, deserve citation: *Hurd v. C.I.R.*, 160 F.2d 610 (1 Cir. 1947); *Round v. C.I.R.*, 322 F.2d 590 (1 Cir. 1964).

now under appeal to the Court of Appeals for the Fifth Circuit: *Finley* v. *United States*, 404 F. Supp. 200 (S.D. Fla. 1975); *Estate of Gilchrist* v. *C.I.R.*, 65 T.C. 5 (1977); *Williams* v. *United States*, 78-2 U.S.T.C. ¶13,264 (W.D. Texas, 1978); and *Estate of Reid* v. *C.I.R.*, 71 T.C. 816 (1979). Whether correctly decided or not, *Gilchrist* is readily distinguishable; it dealt not with a testamentary power of appointment but with a clause conferring on the widow "full rights to transfer all the remainder of my property, both real and personal, so long as she may live." The court held that under Texas law the appointment of guardians transformed, for the period of incompetency, Mrs. Gilchrist's general power over corpus to one limited by an ascertainable standard within §2401(b)(1), 69 T.C. at 15-19. *Estate of Reid*, which relies heavily on *Gilchrist*, is even more remote from the instant case, as it deals with the effect of legal incompetence on taxation under I.R.C. §2036(a)(2). In our view, *Finley* and, if the decedent in *Williams* possessed a testamentary power of appointment, that case also, were wrongly decided.

In sum we hold, on the basis of statutory language, legislative history (particularly the interaction of §2041(a)(1) with the marital deduction, §2056(b)(5)), administrative interpretation and case law, that when an instrument has conferred a testamentary power which by its terms can be exercised in favor of the donee's estate, the property subject to the power is part of the donee's gross estate even though the donee, by virtue of incompetency, was unable to make a valid will at any time after the power was granted.

Affirmed.



550—12-11-79 • USCA—4498 

OUTPUT SYSTEMS, INC., 157 Chambers St., N.Y. 10007, (212) 374-1234

# United States Court of Appeals

## SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of December one thousand nine hundred and seventy-nine.

Present: HON. HENRY J. FRIENDLY
HON. JAMES L. OAKES
HON. JON O. NEWMAN
Circuit Judges

| | |
|---|---|
| ESTATE OF FANNIE ALPERSTEIN, Deceased, ROSALIND A. GREENBERG, Administrix, Petitioner-Appellant, | : |
| v. | : 79-4116 |
| COMMISSICNER OF INTERNAL REVENUE, Respondent-Appellee. | : |

Appeals from The Tax Court of the United States.

This cause came to be heard on the transcript of record from the Tax Court of the United States , and was argued by counsel. ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged,

and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

Arthur Heller

BY: Arthur Heller,
Deputy Clerk

Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-1355

# In the Supreme Court of the United States

OCTOBER TERM, 1979

ROSALIND A. GREENBERG, ADMINISTRATRIX,
ESTATE OF FANNIE ALPERSTEIN, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

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ESTATE OF FANNIE ALPERSTEIN, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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The sole question presented in this federal estate tax case is whether the decision below correctly held that the decedent's gross estate included the value of property over which she possessed a general power of appointment, as defined in Section 2041(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.), even though she was legally incompetent at all times during the existence of the power and thus unable to exercise it under local law.

The pertinent facts may be summarized as follows: Petitioner Rosalind A. Greenberg is the administratrix of the estate of the decedent, Fannie Alperstein. The decedent died intestate on December 3, 1972, five years after the death of her husband, Harry Alperstein (Pet. App. 18a). In his will, the decedent's husband established a trust for the benefit of the decedent under which she was given the right to receive the net income from the trust during her life, and the power to appoint the entire

principal of the trust in her will (Pet. App. 18a-19a). Shortly after her husband's death, the decedent was declared mentally incompetent, and the parties stipulated that from her husband's death until her own death, the decedent lacked the capacity to execute a will under New York law (Pet. App. 19a). At no time from July 6, 1967, the date of death of the decedent's husband (Pet. App. 18a), until her own death, did the decedent exercise her testamentary power of appointment (Pet. App. 19a).

Petitioner did not include the trust property subject to the decedent's power of appointment (valued at $242,167.17) in the decedent's gross estate on the federal estate tax return. On audit, the Commissioner of Internal Revenue asserted a deficiency in the amount of $89,856.21, on the ground that the decedent possessed at death a general power of appointment within the meaning of Section 2041(a)(2) of the Code, which required the inclusion of the entire value of the property in her gross estate (Pet. App. 2a, 20a).

In this suit brought by petitioner in the Tax Court for redetermination of the deficiency, the Tax Court upheld the Commissioner's position that the decedent's gross estate included the value of the trust property subject to the power of appointment. It ruled that an "exercisable" power of appointment, as that term is used in Section 2041, refers to the existence of the power on the decedent's behalf, rather than to the decedent's actual ability to exercise the power of appointment under local law at the time of death. Since the provisions of her husband's will conferred on the decedent an unlimited testamentary power to appoint the trust property, the Tax Court concluded that she was possessed of a general power of appointment within the meaning of Section



2041(a)(2), despite her inability to exercise the power under local law (Pet. App. 6a-8a). The court of appeals affirmed. It held that when an instrument confers upon a decedent a testamentary power, which by its terms can be exercised in favor of the decedent's estate, the property subject to the power is includable in the decedent's gross estate under Section 2041(a)(2) even though the decedent is unable to execute a valid will at any time after the power was granted (Pet. App. 36a).

1. The decision below correctly held that the decedent's gross estate included the value of the trust property over which she had a power of appointment. Section 2041(a)(2) of the Code provides that the gross estate shall include the value of all property with respect to which the decedent has at the time of his death a "general power of appointment" created after October 21, 1942, whether or not the power has been exercised by the decedent. Section 2041(b)(1) defines a general power of appointment as a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. As defined by her husband's will, the decedent's power of appointment was exercisable in such a manner. Under the language of the statute, it was unquestionably a general power of appointment under Section 2041(b)(1). Accord: *Pennsylvania Bank and Trust Co.* v. *United States*, 597 F. 2d 382 (3d Cir. 1979), aff'g 451 F. Supp. 1296 (W.D. Pa. 1978), cert. denied, No. 79-490 (Dec. 3, 1979). See also *Fish* v. *United States*, 432 F. 2d 1278 (9th Cir. 1970).[1] The

[1] *Finley* v. *United States*, 404 F. Supp. 200 (S.D. Fla., 1975), upon which petitioner relies (Pet. 9-12), was reversed on the ground that the district court had no jurisdiction because the taxpayer filed a petition in the Tax Court. See *Finley* v. *United States*, 11 Fed. Taxes Est. & Gift (P-H) para. 148.383 (5th Cir. Feb. 20, 1980). The other lower court decisions cited by petitioner (Pet. 15) (*Estate of Gilchrist*

focus of Section 2041(a)(2) is on the decedent's property at the time of death. Thus, as the court in *Fish* correctly observed (432 F. 2d at 1280 n.3), if estate tax liability turned on the mental capacity of the decedent at the time of his death, the capacity of almost every donee of a power of appointment would be called into question because most people suffer some mental debilitation prior to death.

2. The decision below is also consistent with the legislative history of Section 2041. In 1942, Congress specifically amended the predecessor of Section 2041, which taxed only exercised powers of appointment. The revised statute requires the inclusion of property subject to a power of appointment whether or not the power was exercised by the decedent. See Section 403(a) of the Revenue Act of 1942, ch. 619, 56 Stat. 942.[2] Since Congress enacted special relief provisions for donees of pre-1942 powers who were under a legal disability at the time of the change in the law (Section 403(d)(2) of the Revenue Act of 1942), it is clear that it intended that a post-1942 power held by a donee subject to a legal disability would be included in the donee's gross estate. If Congress had intended to provide an exception for donees subject to a legal disability, it could easily have done so in Section 2041(b)(1), which contains express exceptions to the definition of a general power of appointment.

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v. *Commissioner*, 69 T.C. 5 (1977); *Estate of Reid* v. *Commissioner*, 71 T.C. 816 (1979), and *Williams* v. *United States*, 43 A.F.T.R. 2d (P-H) 1254 (W.D. Tex. Nov. 2, 1978)) are all pending on appeal in the Fifth Circuit.

[2]Section 403(a) amended Section 811(f) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)).



3. Finally, the interpretation of the term "power of appointment" in Section 2041(a)(2) by the decision below is consistent with Section 2056, which allows an estate tax marital deduction for a property interest passing from the decedent to his spouse consisting of a life estate coupled with a general power of appointment. Section 2056(b)(5) provides that property subject to a power of appointment in the surviving spouse is eligible for the marital deduction if the power is "exercisable by such spouse alone and in all events." The Internal Revenue Service has ruled (Rev. Rul. 75-350, 1975-2 Cum. Bull. 367) that the legal capacity of the surviving spouse to exercise the power is irrelevant in determining the availability of the marital deduction under Section 2056(b)(5). If the rule were otherwise, it could never be determined whether the surviving spouse could exercise the power "alone and in all events." On the other hand, under petitioner's position, the estate of the first spouse to die may receive a marital deduction with respect to property which is subsequently excluded from the estate of the remaining spouse because of his or her incompetency, so that the property would be taxed in neither estate—a result Congress carefully sought to avoid.[3] See S. Rep. No. 1013 (Pt. 2), 80th Cong., 2d Sess. 16 (1948); *United States* v. *Stapf*, 375 U.S. 118, 128 (1963). The only reasonable solution is that adopted by the decision below and the Service's ruling, *viz.*, that the legal capacity of a person to exercise a power of appointment is irrelevant both for purposes of determining the marital deduction allowable to the donor's estate and for determining the gross estate of the donee.

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[3]Indeed, under the terms of the will of the decedent's husband (Pet. 4), the amount of property placed in trust for the decedent was contingent on the availability of the marital deduction for his estate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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